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TESTIMONY PRESENTED BY

JERE MELO
MAYOR
CITY OF FORT BRAGG, CALIFORNIA

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

September 30, 2004

Mr. Chairman and Members of the Subcommittee:

Thank you and your staff for the invitation to present testimony to the Subcommittee today.

My name is Jere Melo, and I am the Mayor, City of Fort Bragg, California. The City is located about 150 miles north of San Francisco, right on the Pacific Ocean. Fort Bragg is a city of about 7,000 residents, and it serves a population of 18,000 to 20,000 persons who live and work along about 65 miles of the California coast.

I refer you to the details in the "City of Fort Bragg Case Study", which is attached hereto. My presentation will be as a small town mayor, not as an NPDES permit or Clean Water Act legal expert.

"Are Citizen Suit Provisions of the Clean Water Act Being Misused?"

To get right to the point of this hearing, I believe the citizen suit provisions of the Clean Water Act are being misused. The City of Fort Bragg has been damaged by the provisions for citizen suits. We were faced with the uncertainty and expense of a threatened citizen lawsuit against the discharges from our waste water treatment plant. We believe we were in compliance with our NPDES permit for nearly all of the alleged violations listed in the citizen complaint, but the time and cost to defend the charges was beyond the diminished return. And so, we came to a settlement with the citizen group in order to cut our losses.

I believe it is important to state that in our case, the citizen group was not made up of local, concerned citizens. The group was from a city about 100 miles from Fort Bragg and located in a different county.

Citizen Suits Have Been Used Against Many Cities, Sanitation Districts and Businesses in the Redwood Empire and Across California.

Fort Bragg's experience is not unique. Nearly all of the cities in our part of California have encountered citizen suits. One particular, larger city, Santa Rosa, has been challenged several times, all with the same result. Each city, or sanitation district, settled before the matter went to court. The potential cost of defending the suit and the uncertainty of prevailing on all points raised makes a settlement the most cost- effective solution.

Businesses are also not exempt from citizen suits. There are some manufacturing operations that have an NPDES permit and a waste water treatment process. The same group that challenges publicly-owned treatment plants is the group that threatens suit against business. To some degree, the citizen suit can be a job-killer, in that the cost to settle makes the cost of production rise, and plants become marginal with increases in costs.

I am very active in environmental policy matters through the League of California Cities. I tell you that the experience I relate to you about Fort Bragg and its neighboring cities is becoming more frequent throughout California. As more plaintiff's attorneys see the possibility of easy money in settlements, there are more threats of citizen suits. It is a matter that deserves at least the attention this subcommittee is giving.

Citizen Suits Come From Small Groups

Earlier I indicated that the group that threatened our city with a citizen suit is located about 100 miles away. It is also a very small group. The membership of this group, Northern California **Riverwatch**, seems to consist of less than 10 persons. **Riverwatch** has threatened and collected settlements from all of the cities in our area. In one case of the larger city being challenged multiple times, **Riverwatch** changed its name, but the persons involved were the same. And so, the citizen suit provisions of the Clean Water Act have been co-opted as a new business of threatened litigation and a real goal of extracting money from entities that treat waste water.

Riverwatch Does Not Promote Water Quality Improvements

Once a settlement is complete, there is little interest from our so-called citizen group. The "book" on a **Riverwatch** threat is to suggest a settlement as soon as possible. While the first reaction to a settlement is a rejection, no one has waited long for the settlement negotiations to begin. And they always begin with discussion about their cost to prepare the threat, some costs for their board members to review your plant and process and some other funding for public groups or pet projects.

In Fort Bragg's case, we paid $12,000 to a **Riverwatch** selected consultant to review our plant. In an unmitigated promotion of his private business, his recommendation was to purchase his brand of water treatment chemicals, the "White Knight" brand, as I recall. Now this consultant is a **Riverwatch** board member.

Another provision was to set aside $35,000 in an educational fund, which we did. A group known locally as "Noyo Watershed Alliance" (the Noyo River is the primary water source for Fort Bragg) was given control of the funds for education or land use improvement. The group has unanimously agreed to work to relocate a county road in three locations where very substantial amounts of sediment are now placed in the river. **Riverwatch** is objecting to the use of funds for this work. My best guess is that **Riverwatch** wants the $35,000 to end up in someone's pocket of its choosing, rather than eliminating three substantial sources of sediment to a stream providing habitat for coho salmon and steelhead trout.

RECOMMENDATION

The citizen suit provisions of the Clean Water Act need amendment to prevent misuse. The current system, as applied in the Redwood Empire of California, essentially allows allegations of water quality violations to lead to cash settlements, even where the public agency is already subject to a compliance order and has made commitments toward better operation and maintenance or constructing new facilities or processes.. There is no consideration for a record of otherwise good performance, no consideration for a record of investment for improvements, and no consideration for working with regulatory agencies to achieve consistent compliance and to make continued improvements. Some additional burden of reason and proof needs to be placed on those who threaten a federal suit, prior to filing the 60-day notice, and such suits should be forbidden where a city or other permittee is already under a compliance order, notwithstanding that penalties were not paid. We look forward to any help you can provide to us in this regard.

Thank you,

Jere Melo
Mayor of Fort Bragg (CA)

City of Fort Bragg Case Study:

The City operates a small trickling filter sewage treatment plant rated for 1 million gallons per day in dry weather, but can reach as high as 5-7 million gallons per day in wet weather due to large rain events.

State Action: On January 23, 1997, the Regional Water Quality Control Board issued Cease and Desist Order No. 97-2, which required repairs to the City's collapsed bio-filtration process. The secondary biofilter was repaired in September, 1997.

On December 10, 1998, another Cease and Desist Order ("CDO") No. 98-126 required the preparation of a plan to meet the City's effluent limitations, which were not based on the type of treatment plant operated by the City. The City submitted the plan in February, 1999 and included a time schedule for proposed improvements.

On March 22, 2001, the City's permit was scheduled to be renewed by the Regional Water Quality Control Board, including proposed changes to reflect limits for "treatment equivalent to secondary treatment" applicable to the City's trickling filter plant. However, following comment by RiverWatch, the Board took no action on the permit, but rescinded CDO No. 98-126 and adopted CDO No. R1-2001-23, which modified the time schedule for improvements. Because the permit was never changed, the City remained subject to permit limits not appropriate for the type of treatment plant it operated and made the City vulnerable to citizen suits for permit violations.

The Citizen Suit: In February of 2001, after the Regional Water Board had already issued enforcement orders, RiverWatch sent a 60-day notice letter alleging continuing violations of effluent limits, failure to comply with NPDES permits and reporting requirements, and discharge of raw sewage and pollutants into the Pacific Ocean. The case, which was settled prior to litigation, resulted in a Consent Decree issued July 9, 2002.

Case Results: As a result of the citizen suit filed by River Watch, the City of Fort Bragg:

- As part of the RiverWatch requirements during the settlement process, the City had to retain Bob Rawson, selected by Jack Silver, to conduct an audit/ evaluation of Fort Bragg's collection system and treatment facility at a cost of $12,000. Bob Rawson proceeded to review and make recommendations for treatment plant improvements. One of his recommendations was that the City use a biological product that Rawson just happened to sell. Mr. Rawson is a current member of the RiverWatch Board.

- Paid $25,000 in attorneys fees and costs to Jack Silver plus an equivalent amount in fees to the City's own attorneys.

- Set up a Public Education fund in the amount of $35,000, currently being overseen by the Noyo Watershed Alliance, and now being disputed by Jack Silver.

- The City developed and implemented a grease trap ordinance and inspection program to reduce the risk of improper disposal of grease by restaurants in the City.

- Hired Nute Engineering to complete a pre-chlorination study of the wastewater treatment facility for a cost of $5,000.

- Began the process of addressing inflow and infiltration (I/I) issues. The City has authorized expenditures of $50,000, which was necessary to secure grant funding totaling nearly $720,000 to perform the work. Complete by May 30, 2007, all sewer line repairs identified in a report prepared by the City in 2000.

- Nute Engineering nearly completed the design of the Sand Filter Project as required by the Cease and Desist Order at a cost of approximately $35,000. This project is no longer necessary because of the City's implementation of a permanent chemical feed process that has brought the City into compliance.

The full cost of the suit was in the range of $150,000 to upwards of $200,000 and required the City to do things already obligated to do under the Cease and Desist Order or to do things not required or not related to compliance with the City's permit requirements.

CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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TESTIMONY OF THE

CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

Presented by

MARK DELLINGER
SPECIAL DISTRICTS ADMINISTRATOR
LAKE COUNTY, CALIFORNIA

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

September 30, 2004

Good Morning, Mr. Chairman and Members of the Subcommittee:

I am Mark Dellinger, Special Districts Administrator for the Lake County Sanitation District in Northern California. It is my privilege to address the Subcommittee today on behalf of the California Association of Sanitation Agencies (CASA). CASA is a statewide nonprofit association of over 100 local public agencies that provide wastewater collection, treatment, disposal and water recycling services to millions of Californians. Lake County Sanitation District is a member of CASA.

There is no question that citizen enforcement has played an important role in the implementation of the Clean Water Act and other environmental statutes. Congress envisioned that the role of the citizen lawsuit would be to supplement, not supplant, the primary enforcement function of the States and the federal government. In recent years in California, however, we have seen a cottage industry develop in which plaintiffs' attorneys file citizen suit after citizen suit against numerous local agencies without regard to the magnitude or the environmental impact of the alleged violations, and despite the fact that communities may already be taking steps to rectify their situations, either voluntarily or because the State or USEPA has already undertaken administrative enforcement action.

The Clean Water Act imposes strict liability upon regulated entities. Local public agencies are required to conduct thousands of analytical tests each year, so it is not surprising that there may be a few exceedances. The results must be reported in the form of public records. Thus, establishing a Clean Water Act case is generally very simple. And no matter how strong a showing the local agency can make that it is doing everything it can to comply with its permit and protect water quality, proof of even a handful of violations over a five year period is sufficient to render the plaintiff a "prevailing party" entitled to payments of attorneys fees and costs. As local agencies strive to comply with ever changing, increasingly stringent regulatory requirements, every violation, however minor, is accompanied by the specter of possible administrative enforcement and citizen litigation.

I would like to briefly discuss the Lake County Sanitation District's experience, summarize the experiences of several other communities around the State, and close by offering the Subcommittee some suggestions for reform that we believe will help to reinforce the original intent that citizen litigation serve as a "gap filler," to provide a safety net for the enforcement of real environmental violations where the government fails to step in.

The Lake County Sanitation District manages and operates four wastewater treatment plants and is responsible for 200 miles of sewer collection pipes. We serve a large geographic area that is relatively rural, with a low population density, which makes it more difficult and costly to manage. The median household income in the communities we serve is 62% of the statewide average. In recent years, the District has undertaken a number of capital improvement projects, implemented an enhanced spill response program and made staffing changes to reduce overflows of treated effluent from our

treatment facilities as well as to control overflows from our sewer system. Our Board recently approved a series of rate increases to raise revenues to improve our entire system. In addition, the District has received federal and state grant funding for our Full Circle project, which involves supplying our treated effluent to recharge the Geysers steam field. We see this as a win-win situation; water quality is improved due to the beneficial reuse of our effluent as an alternative to discharge, and the Geysers project generates clean energy for California residents and businesses.

These types of improvements do not happen over night, of course, and unfortunately, as the District has worked to implement its long-range plans, violations of its state discharge permits have occurred, some of which may also be violations of the Clean Water Act. The State regulatory agency, the Regional Water Quality Control Board, placed one of the District's two largest treatment systems under an enforcement order, which requires that certain actions be taken by specified dates. The Regional Board was contemplating taking similar enforcement action for the District's Southeast Regional system, but had not yet issued an administrative order when a so-called "citizen group," Northern California River Watch, sued the District in October 2003 for alleged violations of the Clean Water Act at both of the treatment plants and the associated sewer collection systems. Because the District had not paid a monetary penalty as part of the State enforcement and compliance actions, under Ninth Circuit case law, River Watch's suit was not barred by Clean Water Act Section 1319(g). After River Watch's suit was filed, the Regional Board issued a complaint for monetary penalties against the District for some of the same violations, and the District is now faced with the worst of both worlds: expending its limited resources to defend a citizen lawsuit and paying potentially duplicative penalties in a parallel administrative enforcement action. This is surely not what Congress envisioned.

Other witnesses you will hear from today will tell their similar stories. I would just like to mention a couple of other examples of citizen lawsuits against public agencies to assist the Subcommittee in understanding that Lake County's experience is not unique.

In January 2000, in response to a significant sewer overflow from **the City of Pacific Grove's** collection system into surface waters, the Regional Board levied a $70,000 fine, required payment toward a supplemental environmental project, and set forth specific directives to upgrade and enhance Pacific Grove's sanitary sewer collection system. The City paid the fine and began implementing the programs and asset improvements as directed. In June, 2003, the Ecological Rights Foundation filed a citizen suit against Pacific Grove for alleged violations of the Clean Water Act based on very small sewer overflows, overflows that most likely did not reach navigable waters, and the 2000 overflow in response to which Pacific Grove had already undertaken several new programs to address the prevention of sewer overflows. The resulting consent decree largely memorialized the work the City was already undertaking and did not measurably enhance water quality protection. All but two of the overflows alleged in the complaint were less than 100 gallons. The majority of the alleged violations were less than 20 gallons and did not make it to the Bay. Pacific Grove will pay plaintiffs $300,000. The amount of fees and costs the plaintiff requested were over $400,000, all of which were

allegedly incurred within one year and without going to trial. The aggressive pursuit of litigation versus meaningful settlement negotiations was the major factor in the large fees incurred.

The El Dorado Irrigation District, located in the Sierra foothills, experienced a series of wastewater compliance issues caused by growth in the local service area, combined with a wastewater treatment facility which – unknown to the District until it was too late – was not capable of functioning to its designed capacity. The facility discharged treated water into a seasonal stream that would not have existed without the facility's discharge. Despite the facility's difficulty in meeting all of its permit requirements, the water it discharged into the stream had allowed a thriving ecosystem of native fish, plants, animals, and birds to develop and to survive and flourish through the dry summer months.

In order to meet its permit requirements more consistently, the District embarked on a fourteen million dollar treatment plant upgrade project. The project was proceeding under the oversight of the Regional Water Quality Control Board, which was also processing an enforcement order for penalties for past violations, when the California Sportfishing Protection Alliance filed a citizens' suit seeking penalties for exactly the same permit violations.

Even after the District paid a $105,000 penalty to the Regional Board, the Sportfishing Protection Alliance refused to dismiss its suit. The District was ultimately compelled to pay an additional $140,000 for a supplemental environmental project in lieu of penalties and $160,000 in costs and attorneys fees to settle the citizens' suit simply to avoid the continued cost of litigation. Although supplemental environmental projects are supposed to bear some relationship to the harm caused by the violations, the project selected by the citizen's group was for riverbank restoration tens of miles away from the wastewater treatment facility in an area that had never been affected by the District's facility.

The City of Healdsburg, located in the Northern California wine country, instituted a state-of-the-art sewer maintenance program to eliminate any risk of sewer system overflows. Although it had no sewer system overflows for over three years, and there had been only two overflows in the two years before that (each of which was due to blockages in private laterals, not in the public system), Northern California River Watch filed a notice of intent to file a citizens' suit seeking affirmative injunctive relief and penalties for sewer system overflows. Healdsburg met with River Watch's attorney and made their entire set of public records available for review to demonstrate the effectiveness of their program. Nonetheless, the citizen group filed the lawsuit and, after Healdsburg had defended itself for over a year and spent tens of thousands of its taxpayers dollars on it own attorneys, the citizen's group settled for no penalties and only $7,500 in attorneys fees.

In 1995, a citizen group filed its first lawsuit against **the City of Santa Rosa**. The City won the first lawsuit at trial and on appeal. The same citizen group sued the city again in 1998 and then settled after the city agreed to pay for environmental remediation and a

portion of the attorneys' fees and costs. The citizen group agreed not to sue the city for violations that might occur before a date in the future. In 2000, **the City of Santa Rosa** was sued for a third time by the same attorney representing substantially the same plaintiffs. Throughout the time all three lawsuits were initiated and pending, the City was under a Cease & Desist Order issued by the Regional Water Quality Control Board, under which the City was required to develop and implement a reclaimed water disposal project within a specific time schedule. That project was later implemented in compliance with the state-issued enforcement order.

Prior to the filing of the third lawsuit, the State commenced a comparable enforcement action (seeking monetary penalties) against the City by publishing notice and scheduling a hearing regarding the issuance of a complaint for administrative penalties against the City. However, because the penalty order was not issued until *after* plaintiffs' lawsuit was filed, the Federal District Court found that the state's comparable enforcement action did not bar the plaintiffs' lawsuit.

The City was not only fined $98,350 by the RWQCB for violations alleged in the third lawsuit but also settled the third lawsuit for a total of $195,000 ($75,000 in attorneys fees and $120,000 to fund a grant program). Under the terms of the settlement of the third lawsuit, plaintiff Northern California River watch agreed not to sue the City pursuant to the Clean Water Act for a period of four years. On July 15, 2004—exactly two months after the expiration of the stipulated moratorium on litigation-- River Watch filed a Notice of Intent to Sue Santa Rosa for what can best be described as "creative" interpretations of the Act and the City's permit,. This will be the fourth Clean Water Act lawsuit against the City in less than 10 years.

There are many more examples like these. I want to emphasize that none of these communities were "perfect," in that each of them had experienced compliance problems and did not have spotless records. The important point is that in each case, either the community was already acting by itself or the State had already stepped in and programs were being implemented to guard against similar future violations. Just as the citizen suit was intended to supplement government action, it was also intended to be "forward looking." Citizens may not sue for wholly past violations. Given the length of time it takes to plan, finance and construct improvements, many agencies find themselves in a gray area where even though they have committed to a specific set of improvements, they cannot avoid occasional violations while these upgrades are being made.

From CASA's point of view, reform is needed to ensure that citizen suits serve their intended purpose of supplementing limited government enforcement resources and preventing future violations. I would like to briefly mention several potential reforms for the Subcommittee's consideration.

Clarify Availability of Attorneys Fees:

The availability of attorneys fees is without question a significant motivation for some third party plaintiffs to bring or threaten lawsuits. Under the Clean Water Act, a

"prevailing" citizen plaintiff is entitled to attorneys fees and costs; a prevailing defendant may only recover fees if it can demonstrate that the plaintiff's suit was frivolous or entirely without merit. Thus, except in the most ill advised cases, there is very little downside to pursuing litigation for a third party plaintiff. Contrast that with the circumstance of a local public agency defendant that knows it has a strong case against sizeable penalties but nonetheless has some exposure because of a few minor violations. If the defendant goes all the way through trial, even if it significantly reduces the penalty assessed, it may find itself on the hook for not only its own attorneys' fees, expert fees, and costs, but also similar costs and fees incurred by the plaintiff. These facts place the plaintiff's attorney in a very strong bargaining position with regard to settlement.

Of all of the possible reforms, revisions to the attorneys' fees provisions of the Act are most likely to bear fruit, as the availability of these fees is what is motivating many of the abuses. With that in mind, CASA recommends that the Subcommittee consider the following:

- Limit attorney fee awards to the degree of success on the claims included in the complaint. For example, if a plaintiff alleges 100 violations and proves 10, plaintiff should able to recover only a proportionate amount in fees.

- Issue a clear statement of congressional intent that the attorney fee provision of the Act be read as reciprocal, so that attorneys' fees are available to the prevailing party-- period. The language of the Act supports this reading, but the Courts have interpreted the language to allow prevailing plaintiffs to recover fees while prevailing defendants are held to a much more difficult standard.

- Place a cap on the amount of fees that may be obtained in a lawsuit against a public agency. The cap could be set as either an absolute cap or as a percentage of any penalties assessed. In the latter case, a proportionate cap would insure fees are not disproportionate to the nature of the violations actually proven. While these steps may not prevent "nuisance" suits, they would limit a community's potential exposure to exorbitant fees and make it less of a target.

Reinforce Primary Role of the States

Congress specified that no citizen suit could be maintained where the State or the USEPA is "diligently prosecuting" an action against the alleged violator. Given the time it takes to process a State enforcement action, the fact that the State is already "diligently prosecuting" is not enough to bar a citizen suit. In addition, the Ninth Circuit has determined that only a State enforcement action requiring the payment of monetary penalties will serve as a defense to a citizen lawsuit. Because achieving compliance rather than punishment is generally the goal of water quality enforcement actions, the State or USEPA will often choose not to require payment of monetary penalties preferring to allow the agency to spend its limited resources on fixing the problem. In light of this, we ask the Subcommittee to consider:

- Requiring courts to consider the improvements and actions already being undertaken by the community either on its own initiative or pursuant to an enforcement order, a capital improvement program, or master plan, etc. The citizen suit should not go forward unless it can be shown it is likely to "trigger" further, significant and necessary improvement or redress the violations in a manner supplemental to those already underway. Courts could be authorized and encouraged to stay citizen litigation while the improvements already contemplated by the community are developed and implemented.

- Clarifying that where the State has already taken, or is in the process of taking, an enforcement action for violations, citizen litigation for the same or similar violations is barred, whether or not the State action is complete or included the assessment of monetary penalties. The 60 day window within which government is supposed to act is simply not adequate time for a state regulatory agency to investigate alleged violations, evaluate the appropriate enforcement approach, issue a complaint, provide an opportunity for public notice and comment, hold any required hearing and complete the action. It should be sufficient for the State or USEPA to make a determination as to whether it intends to enforce within a specified number of days. If the government decides to bring an action, the citizen suit should be stayed pending initiation and resolution of the agency enforcement action. If the State enforcement action is not completed within a reasonable period of time, the third party plaintiff could then proceed with its suit.

There may be other reforms suggested here today. CASA is very appreciative of the Subcommittee's interest and leadership in finding solutions to the citizen suit abuses. We urge the Subcommittee to consider carefully the various options for improving the law and ensuring that citizen suits against local government only proceed where they will promote real environmental solutions. Local agencies want to be partners with the federal government and the states in achieving water quality improvements. Diverting attention, limited resources, and energy to defend third party lawsuits where compliance solutions are already underway is counterproductive and disheartening.

Thank you for your time. Melissa Thorme, an Attorney with the Sacramento law firm of Downey Brand, LLP, and a Member of CASA's Attorneys Committee, is here with me and we would be pleased to answer any questions that the Subcommittee may have.

amsa

Association of
Metropolitan
Sewerage Agencies

TESTIMONY OF THE

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES (AMSA)

September 30, 2004

Presented by

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Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

in

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Testimony of Christopher Westhoff
Assistant City Attorney, Public Works General Counsel,
Los Angeles, California
on behalf of the
Association of Metropolitan Sewerage Agencies

Introduction

Good morning Chairman Duncan, Congressman Costello, Congressman Thompson, and members of the Committee, my name is Chris Westhoff. I am an Assistant City Attorney for the City of Los Angeles and I have served as General Counsel to the City's Department of Public Works for over 20 years. I am also a Board member of the Association of Metropolitan Sewerage Agencies ("AMSA") and serve as AMSA's Secretary and as Chair of AMSA's Legislative Policy Committee. AMSA represents nearly 300 clean water agencies across the country. AMSA's members treat more than 18 billion gallons of wastewater each day and service the majority of the U.S. sewered population.

On behalf of AMSA and the City of Los Angeles, I would like to thank you, Chairman Duncan, and the members of this Committee for your continued commitment to clean water issues – in California and nationwide. Your dedication to solving the challenges our communities face across the nation, including in Los Angeles, is essential to achieving the goals of the Clean Water Act.

Our nation's streams, rivers, lakes and oceans are cleaner today than they have been in over half a century. This has been accomplished by the unparalleled efforts of the many cities, special districts, municipalities, and industries that discharge treated effluent into the waters of the United States. The backbone of the transformation of America's waters has been the Federal Clean Water Act.

Hundreds of billions of dollars have been spent by the federal government, states, industries, and cities around the country to bring our nation's waters to their current condition. And, we must continue to spend billions more to maintain the improvements we have achieved to date and to continue moving forward in the pursuit of improving the quality of our receiving waters.

Without question, the efforts of the governmental regulators entrusted with enforcement authority under the Clean Water Act – and in cases, the actions of citizens and environmental organizations stepping in when governmental regulators neglected to act – have contributed to our national water quality improvements. However, the natural tension between appropriate governmental regulatory action and citizen enforcement frequently has placed permitted entities like my City in a losing battle.

The drafters of the Clean Water Act clearly saw governmental enforcement against permitted dischargers as the critical element in the ultimate success of the intent of the Act. In the Act itself, citizen enforcement was designed to play a secondary, supplementary role, allowed only when the appropriate governmental regulators failed to diligently prosecute a permit holder for violations.

Yet today, the combination of court precedent and the U.S. Environmental Protection Agency's ("EPA's") narrow interpretation of its own regulations has skewed the intent of Congress concerning citizen enforcement. Today, permitted dischargers like my City, in California and across the country, routinely suffer the indignity, negative publicity, and substantial financial burden of having to respond to third party lawsuits brought by environmental activist groups for substantially the same violations addressed in prior enforcement actions by our regulators.

The concept of "double jeopardy" is fundamental in American jurisprudence. While not rising to the level of actually violating this foundational cornerstone, when a permitted discharger has already answered to its governmental regulator in an enforcement action, it is patently unfair for the permit holder to be required to address the same issues in a third party lawsuit filed under the citizen suit provisions of the Clean Water Act. When regulators diligently enforce, citizen suits should be precluded.

Nonetheless, Los Angeles just finished six years of litigation initially filed in 1998 by a third party citizen group, the Santa Monica Baykeeper, and ultimately joined years later by the EPA and the U.S. Department of Justice. This citizen suit was brought notwithstanding the fact that the City had settled an enforcement action for the same violations with our state permitting entity in the month immediately prior.

Because of its size and reputation, Los Angeles may not engender a lot of sympathy when it finds itself as the victim of a lawsuit filed by an environmental group. However, if it can happen to Los Angeles, it can happen to any other permitted discharger – industrial, special district, or municipality – large or small across this nation.

Los Angeles has a municipal wastewater collection system that consists of close to 7,000 miles of pipe ranging from six inches to over 12 feet in diameter. In the winter of 1998 Los Angeles experienced an "El Nino" climatic condition which resulted in one of the wettest winters in 120 years of recording such statistics. In the month of February 1998 alone, we received over 14 inches of rain, the rainiest February on record. To put this in perspective, the average total rainfall for a year in Los Angeles is just over 15 inches.

Needless to say, the City's wastewater collection system was overtaxed and experienced overflows during this rainy winter. Close to 50 million gallons of wastewater spilled from the City's pipes in Winter 1998. The good news in this experience was that even with the incredible amount of rain we experienced, the wastewater that spilled from the system was confined to six distinct locations in the City – and projects to remediate these six locations were already underway. I know 50 million gallons seems like a large number, but to give you a frame of reference, Los Angeles transports close to 190 billion gallons of wastewater a year – so even in this extraordinarily wet year, the City still only spilled less than ½ of one percent (.005 percent) of all the wastewater collected that year, and kept 99.995 percent of the wastewater in the pipes.

The City's permitting regulator sought to enforce against the City for these spills as well as other small spills caused by root and grease blockages. In September 1998, the City agreed to settle the enforcement action by agreeing to a Cease and Desist Order from the regulator and paying an $850,000 penalty ($200,000 in cash and $650,000 in environmental projects). Further, Los Angeles agreed to construct major sewer projects totaling over $600 million on an accelerated schedule of just over six years. One project alone was the largest single public works project ever awarded by the City of Los Angeles at just over $250 million for a 12 foot diameter mainline sewer tunnel. This project was built in a compressed timeframe through the simultaneous use of four tunnel boring machines, the first time this was ever done.

In October of the same year, the Santa Monica Baykeeper held a press conference and announced their lawsuit concerning the exact same sewer spills addressed by the Cease and Desist Order issued by the City's permitting regulator just one

month before. You may wonder why the Baykeeper's suit was not precluded by our prior settlement. Because all they had to allege is that the City would have future spills – while our remediation projects were underway – and their case could proceed. To complicate matters, in January 2001, the EPA, through the Department of Justice, filed yet another lawsuit – this one covering the same spills as the Cease and Desist Order and the Baykeeper lawsuit, and adding on small spills that had occurred between 1998 and 2001.

It is important to note that in the six years since the 1998 "El Nino" winter, Los Angeles has had only four wet weather related spills. All other spills during that time frame have been caused by root and grease blockages. Also, in the six years since 1998, the average yearly volume of wastewater spilled out of the Los Angeles collection system has been one ten thousandth of one percent (.000001%) of the total volume collected. That is a pretty good batting average in any league except the Clean Water Act. You see, EPA's interpretation of its own Clean Water Act regulations is that all spills from a separate sanitary sewer collection system are flatly prohibited, regardless of volume, cause, or impact on water quality.

Even with our comprehensive maintenance program, a municipal wastewater collection system works at its heart like your pipes at home – only our systems are dramatically larger with more potential spill points. When do you call Roto Rooter® out to your house, before or after you have a backup? And, unlike a homeowner who can stop running water when they have a blockage in their line to prevent a spill out of a toilet, sink or bathtub; the wastewater in our pipes keeps coming 24 hours a day, seven days a week, and 52 weeks a year.

EPA has publicly documented that even the best run, best maintained separate City sewer systems will overflow. And yet, using a strained regulatory and legal analysis, EPA and enforcement authorities take a strict liability approach to these inevitable overflows. This makes every community with separate sewers an easy target for enforcement by third party plaintiffs.

The hard dollar cost to my City of our recent citizen suit experience – and let me reiterate that we were sued after we had been diligently enforced against by our regulator – reads like this: City's outside attorney fees, almost $5 million; Baykeeper attorney fees, $1.6 million; other citizen intervenors attorney fees, over $400,000; penalties, $800,000 (cash), $8.5 million (environmental projects). And this figure does not account for the incredible amount of staff time spent supporting the litigation effort and diverting staff from their core responsibilities. I can attest that this duplicative citizen suit did not yield additional environmental benefit to the citizens of Los Angeles – although it is the citizens' money that ultimately pays for needless litigation and attorneys fees through rising sewer rates.

Let me be clear. No one is asking that citizen suits go away. As responsible environmental stewards, we realize that the citizen suit provision of the Clean Water Act is a powerful and necessary tool – to fill enforcement gaps. Where a regulator is not diligently enforcing the Clean Water Act, citizen suits are a critical and important secondary source of Clean Water Act enforcement. However, where Congress' intended prime Clean Water Act enforcer has done or is doing its job, municipalities need protection from redundant third party lawsuits that will raise the cost of the clean water services we provide.

Let me conclude by stating that AMSA would welcome the opportunity to work with this Subcommittee to discuss ways to focus future third party lawsuits against municipalities where Congress intended them – where there is an enforcement gap. I note that some of the witnesses today will offer the Subcommittee specific reforms to begin this dialogue. We will be pleased to contribute to the process.

Again, I thank you for your attention to this important issue. At this time, I would be happy to answer any questions.

OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

September 29, 2004

The Honorable John J. Duncan, Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
House of Representatives
Washington, DC 20515

Dear Chairman Duncan and Congressman Costello:

On September 30, 2004, the Water Resources and the Environment Subcommittee will conduct a hearing regarding the Citizen Suit provisions of the Clean Water Act, wherein reference may be made to the City of Los Angeles' prior lawsuit with citizen plaintiffs over sewage issues. The City of Los Angeles would like to express to the Committee our ongoing support for the principles contained in the settlement agreement for this case, which was initially brought by citizen plaintiffs Santa Monica Baykeeper and later joined by the State of California and the U.S Environmental Protection Agency.

The recent settlement is a win-win for everyone in Los Angeles, and the undersigned remain committed to moving forward with a successful rehabilitation of our sewer system and the resulting environmental benefits from such action.

Sincerely,

Rockard J. Delgadillo
City Attorney

Jack Weiss
Councilmember, District 5

Eric Garcetti
Councilmember, District 13

Wendy Greuel
Councilmember, District 2

Jan Perry
Councilmember, District 9

Antonio Villaraigosa
Councilmember, District 14

WATERKEEPER® ALLIANCE

September 30, 2004

The Honorable John J. Duncan, Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
House of Representatives
Washington, DC 20515

Re: "Are Citizen Suit Provisions of the Clean Water Act Being Misused?"

Dear Chairman Duncan and Congressman Costello,

On Thursday September 30, 2004, the Water Resources and the Environment Subcommittee will hold a hearing on Citizen Suit provisions of the Clean Water Act. Waterkeeper Alliance and our 124 member programs nationwide depend on these provisions in our work to improve public health and safety. As you know, the Santa Monica Baykeeper recently settled a suit with the City of Los Angeles to substantially reduce illegal sewage spills throughout the city. This is just one of many examples where our member programs used these provisions to protect human, economic and environment health of communities that depend on their local rivers, lakes, and coastal waters.

We understand from the September 27, 2004 summary of this hearing that this committee will hear testimony that the case against Los Angeles was potentially a misuse of the citizen suit provision as "duplicative citizen action." The report appears critical of citizen participation in the case, stating that a witness will testify that "the settlement addressed the same violations already dealt with in the 1998 settlement between the City and State, and imposed much the same requirements that the City had already agreed to in the 1998 settlement." To the extent such testimony is given, it is simply false. Waterkeeper Alliance respectfully requests that the subcommittee considers all the facts of this case in your deliberation of this issue.

In 1998, Santa Monica Baykeeper founder Terry Tamminen notified the City of Los Angeles that he was fed up with raw sewage spills – nearly two a day that contaminated neighborhoods and beaches – and that he intended to file suit against the City. A 60-day notice letter was sent as required by the Clean Water Act.

The City responded by approaching the Regional Water Quality Control Board ("Regional Board"), a state agency. This was an attempt to block Baykeeper's action. The result of this was a Cease and Desist Order requiring certain upgrades to the sewage system, which the City and Baykeeper supported. A penalty, which the City and Baykeeper also supported, was also levied by the Regional Board. Unfortunately, the action taken by the Regional Board – while important – only resolved a limited number of the City's sewage problems. Soon thereafter, Baykeeper filed suit to address the remaining sewage spill issues, alleging some 20,000 violation of the Clean Water Act.

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After conducting their own audit of the system, **the Regional Board and U.S Environmental Protection Agency agreed that deficiencies were far more significant than those covered by the prior state enforcement order**. In 2001 – nearly two and half years after Baykeeper's action was filed – USEPA and the State filed suit against the City of Los Angeles. The Baykeeper and government cases were consolidated, and the Baykeeper and the government plaintiffs began working side-by-side on a daily basis to prosecute the City's violations of the Clean Water Act. The Department of Justice and the State never once questioned the validity of Baykeeper's participation in the suit or the obvious need for relief beyond that contained in the Regional Board's action. The problems were clear; more needed to be done to correct Los Angeles's on-going pattern of sewage spills throughout the City. Santa Monica Baykeeper's attorneys and technical experts contributed significantly to the evaluation of alternatives to sewage spills and the ultimate resolution of the matter.

Nonetheless, the City attempted to dismiss Baykeeper as a plaintiff in the case. However, the City failed to convince a judge that the violations in the complaint were covered by the prior government action. Instead, the City of Los Angeles was found to have violated the Clean Water Act on several hundred occasions – violations that were not covered by the Regional Board's prior enforcement action. Soon thereafter, the City acknowledged liability for nearly 3,670 violations of the Act – again, violations that were not covered by the Regional Board's prior enforcement action.

Waterkeeper Alliance and Baykeeper are confused and surprised by statement's in the subcommittee's September 27 summary regarding potential testimony from the City representatives. At a press conference announcing the settlement, Mayor James Hahn, City Attorney Rocky Delgadillo and numerous Los Angeles City Councilmembers applauded Baykeeper's participation in the case, even thanking Baykeeper and other citizens for "holding their feet to the fire." The City publicly acknowledged that it was Baykeeper who forced the city into the agreement.

After six years of difficult litigation, the Santa Monica Baykeeper looks forward to a productive working relationship with the City of Los Angeles in improving water quality. However, for anyone to characterize the Santa Monica Baykeeper sewage litigation as an inappropriate use of the citizen suit provision is simply wrong. Indeed, we believe that Baykeeper's sewage litigation is exactly the type of case for which Congress created the citizen suit provision. This case should be held out as a model of how citizen groups and government can work together to resolve local pollution problems.

Waterkeeper Alliance and the Santa Monica Baykeeper thank the Chairman and Ranking Member for holding this hearing. As a coalition representing tens of thousands of citizens who rely on the Clean Water Act, we will remain available to you at any time to answer any questions or provide additional information that will help your deliberation of this very important issue. Thank you.

Sincerely,

Steve Fleischli
Executive Director
Waterkeeper Alliance

Tracy Egoscue
Executive Director
Santa Monica Baykeeper

California Regional Water Quality Control Board

Los Angeles Region

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Terry Tamminen
Secretary for Environmental Protection

Arnold Schwarzenegger
Governor

September 29, 2004

The Honorable John J. Duncan, Jr., Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
U.S. House of Representatives
B-376 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Duncan and Representative Costello:

U.S. HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE: SEPTEMBER 30, 2004, HEARING ON CLEAN WATER ACT CITIZEN SUITS

It has come to our attention that the Subcommittee on Water Resources and Environment will conduct a hearing on Thursday to consider whether Clean Water Acts citizen suits are being abused. A committee document indicates that a focus of discussion will be a Clean Water Act lawsuit recently settled involving thousands of sewage spills in the City of Los Angeles. In our opinion, the Los Angeles sewage spill litigation and its resolution serve as an example of why Clean Water Act citizen suits are not only a good idea from the viewpoint of public policy, but are necessary to achieve the Clean Water Act's goals.

As the Chair and Vice Chair of the Los Angeles Regional Water Quality Control Board, we can offer a unique perspective to your colleagues on this issue. In addition to our other responsibilities, our agency has primary responsibility for issuing and enforcing Clean Water Act permits in the Los Angeles region. In our experience, the very limited number of citizen suits that have been brought in our region have provided important public benefits: supplementing the resources of state and federal agencies, as well as pursuing avenues of improvement regulators may not have considered.

The Los Angeles sewage spill case is an example of such a success. The Regional Board had previously brought a limited enforcement action against the City of Los Angeles. The Clean Water Act citizen plaintiffs, including Angelinos forced to endure raw sewage flowing through their streets and yards, recognized that more could and needed to be done. The citizen plaintiffs, led by the Santa Monica Baykeeper, pursued a broader enforcement action designed to ensure that Los Angeles' aging sewage system was modernized and public health protected.

Ultimately, the Regional Board and the U.S. Environmental Protection Agency agreed with the citizens that Los Angeles needed to do more. The regulatory agencies then filed suit drawing in great part on the claims made by the citizens. The cases were joined with the citizens' lawsuit. Throughout the remainder of the litigation, the citizens, Regional Board, and U.S. Environmental Protection Agency worked closely and collectively to pursue the litigation and to protect Angelinos, particularly in economically challenged neighborhoods, from a sewage collection system that was endangering their health.

Simply, the September 30, 2004, hearing seems to be addressing an issue that we have not seen in the Los Angeles region. Clean Water Act citizen suits have been few and far between in our region. Further, the one notable exception is the Los Angeles sewage spill case. In that case, the citizen plaintiffs served an instrumental roll in implementing the Clean Water Act.

Sincerely,

Francine Diamond
Chair

Susan Cloke
Vice Chair

cc: Mr. Jonathan Bishop
Interim Executive Officer
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

California Environmental Protection Agency

Air Resources Board • Department of Pesticide Regulation • Department of Toxic Substances Control
Integrated Waste Management Board • Office of Environmental Health Hazard Assessment
State Water Resources Control Board • Regional Water Quality Control Boards

Terry Tamminen
Agency Secretary

Arnold Schwarzenegger
Governor

September 29, 2004

The Honorable John J. Duncan, Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
House of Representatives
Washington, DC 20515

Re: *Clean Water Act Hearing*

Dear Chairman Duncan and Congressman Costello:

I understand that tomorrow the Water Resources and the Environment Subcommittee plans to hold a hearing on Citizen Suit provisions of the Clean Water Act. I am told that testimony will be presented at this hearing regarding the recently settled case against the City of Los Angeles initiated by the Santa Monica Baykeeper for thousands of illegal sewage spills. As the former Executive Director of the Santa Monica Baykeeper and the current Secretary of the California Environmental Protection Agency, I am uniquely positioned and experienced to comment on this particular matter, and on the value of citizen lawsuits based on the Clean Water Act in general.

At my direction, in August 1998 Santa Monica Baykeeper submitted a 60-day notice letter that the organization intended to file suit against the City because of its sewage spills. In 2001, the U.S. Environmental Protection Agency and the State of California filed a lawsuit against the City of Los Angeles, and the Baykeeper case and the government cases were soon consolidated, and the Baykeeper and the government plaintiffs began working together. Also in 2001, local homeowner organizations representing neighborhoods that had been significantly affected by sewage spills and odors joined the plaintiffs. The Federal Department of Justice and the State believed in the need for additional relief beyond the Regional Board's original action in 1998, and vigorously worked with the Baykeeper attorneys and technical experts and the homeowners' organizations to resolve the expanded case.

In August 2004, a meaningful and precedent-setting settlement agreement was reached that will greatly benefit the citizens of Los Angeles. I believe that any attempt to describe this litigation as an inappropriate use of the citizen suit provision is false. Indeed, this is exactly the type of case for which Congress created this provision. This particular case demonstrates how citizen groups and government can work together to resolve local pollution problems.

Thank you for your consideration and I welcome your questions or comments regarding this issue.

Sincerely,

Terry Tamminen
Agency Secretary

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